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No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1942

IN RE WILLIAM V. BRADLEY, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Statement	1
Discussion	4
Conclusion	14
Appendix	15

CITATIONS

Cases:

Ainsworth v. *Sanford*, 104 F. (2d) 96	9
Anderson v. *Denver*, 265 Fed. 3	11
Ball v. *United States*, 140 U. S. 118	11, 12
Bergdoll v. *United States*, 279 Fed. 404, certiorari denied, 259 U. S. 585	5
Biddle v. *Thiele*, 11 F. (2d) 235	13
Blackmer v. *United States*, 284 U. S. 421	11
Blitz v. *United States*, 153 U. S. 308	9
Benner, In re, 151 U. S. 242	13
Bryant v. *United States*, 214 Fed. 51	13
Clark v. *United States*, 61 F. (2d) 695, 709, affirmed, 289 U. S. 1	3
Copeland v. *Archer*, 50 F. (2d) 836	13
Davis, Ex parte, 112 Fed. 139	3
D'Allessandro v. *United States*, 90 F. (2d) 640	9
DeBenque v. *United States*, 85 F. (2d) 202, certiorari denied, 298 U. S. 681	13
De Maggio v. *Coze*, 70 F. (2d) 840	9
Diaz v. *United States*, 223 U. S. 442	11, 12
Downey v. *United States*, 91 F. (2d) 223	11
Fels v. *Snook*, 30 F. (2d) 187	12
Fiske v. *Commissioners of District of Columbia*, 38 App. D. C. 120	5
Fleisher v. *United States*, 302 U. S. 218	9
Fotter v. *Zerbst*, 92 F. (2d) 950	11
Garrison v. *Reeves*, 116 F. (2d) 978	9, 13
Gilmore v. *United States*, 124 F. (2d) 537, certiorari denied 316 U. S. 661	13
Hammers v. *United Sates*, 279 Fed. 265	13
Hartwell v. *United States*, 107 F. (2d) 359	5
Hatem v. *United States*, 42 F. (2d) 40	9
Hewitt v. *United States*, 110 F. (2d) 1, certiorari denied, 310 U. S. 641	9

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Cases—Continued. Page

Holiday v. *Johnston*, 313 U. S. 342 13
Jackson v. *United States*, 102 Fed. 473 10
Lange, Ex parte, 18 Wall. 163 ..... 4, 5, 6, 10
Lewis v. *United States*, 146 U. S. 370 11
List v. *Pennsylvania*, 131 U. S. 396 5
McDowell v. *Johnston*, 36 F. Supp. 902 12
Menken v. *Atlanta*, 131 U. S. 405 5
Meyers v. *United States*, 116 F. (2d) 601 13
Miller v. *Aderhold*, 288 U. S. 206 13
Miller v. *United States*, 4 F. (2d) 228, certiorari denied, 268 U. S. 692 10
Miller v. *United States*, 128 F. (2d) 519, certiorari denied, October 12, 1942 (No. 150 present term) 13
Millich v. *United States*, 282 Fed. 604 10
Moss v. *United States*, 23 App. D. C. 475 ..... 3, 7
Murphy v. *United States*, 285 Fed. 801 10
Nagel v. *The People*, 229 Ill. 598 11
Peck v. *United States*, 65 F. (2d) 59 11
Price v. *Zerbst*, 268 Fed. 72 12
Priori v. *United States*, 6 F. (2d) 575 10
Robinson, Ex parte, 19 Wall. 505 3
Robinson v. *Johnston*, 118 F. (2d) 998, certiorari granted and case remanded for further proceedings, 316 U. S. 649 13
Rowley v. *Welch*, 114 F. (2d) 499 9
Salazar v. *United States*, 236 Fed. 541 10
Schwab v. *Berggren*, 143 U. S. 442 ..... 11, 12
Spirou v. *United States*, 24 F. (2d) 796, certiorari denied, 277 U. S. 596 10
Terry, Ex parte, 128 U. S. 289 11
United States v. *Benz*, 282 U. S. 304 9
United States ex rel. Campbell v. *Bishop*, 47 F. (2d) 95 10
United States ex rel. Coleman v. *Cox*, 47 F. (2d) 988 12
United States v. *Healy*, 202 Fed. 349 9
United States v. *Mazzochi*, 75 F. (2d) 497 9
United States v. *Phillips*, 6 Pet. 776 5
United States v. *Wittmeyer*, 89 F. (2d) 660 5
Waterman, Ex parte, 33 Fed. 29 12
Wells v. *United States*, 124 F. (2d) 334, certiorari denied, 316 U. S. 661 13
Wilson v. *United States*, 26 F. (2d) 215 3
Yatovsky v. *United States*, 1 F. (2d) 169 7

Statutes:

Judicial Code:
Sec. 126 (28 U. S. C. 223) 4
Sec. 268 (28 U. S. C. 385) 3
18 U. S. C. 541 12
18 U. S. C. 641 8

Miscellaneous:

	Page
49 A. L. R. 494	7
Certificate, Clerk of U. S. Circuit Court of Appeals, dated December 28, 1942	15
Certificate, Judge Maris, dated December 28, 1942	16
Letter from the Director, Administrative Office of the United States Courts to Solicitor General, dated December 3, 1942	17
Rule 3 of the Circuit Court of Appeals for the Third Circuit in effect February 1, 1942	4

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Petitioner was on September 28, 1942, adjudged by the Circuit Court of Appeals for the Third Circuit guilty of criminal contempt because of his intimidation of a witness in a corridor adjoining the courtroom of the court, and was sentenced to imprisonment for a period of six months and to pay a fine of $500. He was to stand committed until compliance with the sentence. The Marshal was directed to execute the judgment forthwith (R. 40, 69–70). Pursuant to this direction, according to petitioner (Br. 7), he was taken immediately into custody. The record shows only, with

reference to what transpired subsequent to the imposition of sentence, that on October 1, 1942, the $500 fine was paid in cash to the clerk of the Circuit Court of Appeals by one of petitioner's attorneys (R. 2) and that thereafter on the same day an "Order Amending Judgment" was filed (R. 2, 70–71). This order so amended the language of the prior judgment as to delete the fine and retain the six months' term of imprisonment.[1]

Since no opinion accompanied the amendatory order, and the record does not disclose the circumstances under which it was entered, we have obtained two certificates, one from Judge Maris, the senior of the two circuit judges presiding at the contempt hearing, and one from the clerk of the Circuit Court of Appeals, which we have printed in the Appendix, *infra*, pp. 16–18. These certificates, with another from the clerk appearing in the Appendix to petitioner's brief (Br. 34–35), disclose that the fine was paid to the clerk of the court below by one of petitioner's attorneys prior to 11:30 o'clock on the morning of October 1; that not having as clerk of a circuit court of appeals ever received a fine, the clerk consulted with Judge Maris as to its disposition; that Judge Maris advised him to consult the clerk of the district court, who was familiar with the handling of

[1] It obviously did not increase the term of imprisonment, as petitioner asserts (Br. 31–33).

fines; that subsequently on the same day the Assistant United States Attorney who participated in the contempt proceeding advised Judge Maris that "the imposition of a fine and imprisonment for a summary contempt was questionable";[2] that later in the afternoon of October 1, after banking hours and before the fine was deposited in any official account of the court, the clerk received from the court the amendatory order deleting the fine and retaining the imprisonment, and was instructed to return the fine to petitioner's attorney; that he succeeded in contacting petitioner's attorney on the next day but the attorney refused to accept the money; that the money at the present time is in the personal custody and control of the clerk.[3] While the court was not in session on October 1, 1942, the date the amendatory order was filed (Certificate, Pet. Br. 35), the court had not adjourned for the term at which the original sentence

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[2] The imposition of both fine and imprisonment was erroneous. Section 268 of the Judicial Code (28 U. S. C. 385), provides, in part: "The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * *." See *Ex parte Davis*, 112 Fed. 139, 142 (C. C. D. Fla); *Wilson* v. *United States*, 26 F. (2d) 215, 216 (C. C. A. 8); *Clark* v. *United States*, 61 F. (2d) 695, 709 (C. C. A. 8), affirmed, 289 U. S. 1; *Moss* v. *United States*, 23 App. D. C. 475, 485; see also *Ex parte Robinson*, 19 Wall. 505, 512.

[3] The clerk advises that he will continue to hold it until the final disposition of the case.

was entered[4] (Certificate, Appendix hereto, p. 17, *infra;* see also R. 1–2).[5]

DISCUSSION

Petitioner contends that the amendatory order of October 1 is void because it "was not entered in open court but merely filed with the Clerk in the absence of petitioner and his counsel * * *; without notice to petitioner or his counsel and while petitioner was effectually prevented from being present by the previous sentence of the court." (Br. 28). We believe this point is well

[4] A new term did not start until October 5, 1942. Section 126 of the Judicial Code (28 U. S. C. 223), so far as pertinent, provides: "A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: * * * in the third circuit, in Philadelphia; * * *." Rule 3 of the Circuit Court of Appeals for the Third Circuit in effect February 1, 1942, provides that "One term of the court shall be held annually commencing on the first Monday of October. * * *"

[5] Presumably the above facts may be considered by this Court since they are facts which were within the knowledge of the court below and of its clerk when the amendatory order was entered. In *Ex parte Lange*, 18 Wall. 163, the fact that the fine had been paid to the court clerk and by him deposited into the Treasury (p. 164) appears, according to the dissenting opinion (pp. 180, 190, 199–200), to have been disclosed pursuant to a certificate by the clerk. In appeals under the Criminal Appeals Act it is, of course, a familiar practice to establish by certificate of the district judge that his decision involved the construction of the statute on which the indictment was based and not the sufficiency of the indictment as a pleading. The certificates would seem to stand on a parity with an opinion reciting the material facts.

taken and that the case should be remanded to the circuit court of appeals for further proceedings in connection with the sentence. For this reason it would seem unnecessary to discuss petitioner's contentions with respect to the merits of his conviction (Br. 10–22), or, except incidentally, his further contention that the court's jurisdiction over the case was exhausted upon payment of the fine[6] (Br. 24–27).[7]

It is the position of petitioner that the decision of this Court in *Ex parte Lange*, 18 Wall. 163, conclusively establishes that the court below lacked power to amend its original judgment as was done (Br. 25). The *Lange* case has been regarded generally as establishing the broad propositions that when a court has imposed a fine and im-

[6] What petitioner means, of course, is that the court had power to enter no other amendatory order than one concluding the imprisonment.

[7] The court's disposition of the case on a remand may finally dispose of the litigation. Thus, if the court on remand should decide to accept the fine and terminate the imprisonment, the judgment would be satisfied (*Ex parte Lange*, 18 Wall. 163) and there would be no questions presentable by petitioner to this Court for review. Cf. *Bergdoll* v. *United States*, 279 Fed. 404 (C. C. A. 3), certiorari denied, 259 U. S. 585; see also *United States* v. *Phillips*, 6 Pet. 776; *List* v. *Pennsylvania*, 131 U. S. 396; *Menken* v. *Atlanta*, 131 U. S. 405; *United States* v. *Wattmeyer*, 89 F. (2d) 660 (C. C. A. 9); *Fiske* v. *Commissioners of District of Columbia*, 38 App. D. C. 120, 122, 123. Compare *Hartwell* v. *United States*, 107 F. (2d) 359, 360 (C. C. A. 5) (where the fine was but one element of the judgment).

prisonment where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the judgment by imposing imprisonment; that the judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to the offense is at an end; and that a second judgment on the same verdict is, under such circumstances, void for want of power, affords no authority to hold the party a prisoner, and he must be discharged. Factually the *Lange* case, it seems to us, stands on a narrower basis, and, therefore, is distinguishable from the instant case. In the *Lange* case it was recognized that at the time of the attempted correction the fine had "passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States" (p. 175). We think the references to this fact in the opinion were not immaterial; that the losing by the trial court of control of the money was a significant factor underlying the reasoning of this Court that the conceded power of modification which a court has over its judgments during the term could not be effectively exercised in the case before it (cf. p. 175 with p. 167 of the majority opinion and with p. 200 of the minority opinion). In the instant case, however, the fine had not passed beyond the control of the

court below when it entered its amendatory order deleting it and retaining the imprisonment.[5] But the same court which entered that order rejected the distinction, although we think wrongly, in its opinion in *Yavorsky* v. *United States*, 1 F. (2d) 169, a case substantially identical with the instant case. Its position in that case was that it was of no concern to the defendant whether the money was still within the court's control at the time of the attempted amendment since the defendant had as fully suffered a permitted alternative punishment when he paid the fine as if the fine had been forthwith deposited into the Treasury of the United States. It is also true that there are several state decisions, principally by the Illinois Supreme Court, and a decision by the Court of Appeals for the District of Columbia (*Moss* v. *United States*, 23 App. D. C. 475, 485) which expressly hold, in reliance upon the *Lange* decision, as well as other state decisions which recognize, that the prisoner is entitled to his discharge after he has paid the fine.[6] These decisions, we believe, incorrectly extend the *Lange* case beyond its peculiar facts.

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[5] This would have been true even if the clerk of the circuit court of appeals had deposited the fine in the same manner as his other collections. See letter from the Director, Administrative Office of the United States Courts, to the Solicitor General, dated December 3, 1942 (Appendix *infra*, pp. 18–20).

[6] These state decisions are collected in an annotation in 49 A. L. R. 494.

In view, however, of the existing authorities it must be apparent that petitioner has a point of considerable substance as to the power of the court below, in view of the payment of the fine, to have entered any amendatory order other than one terminating the imprisonment. If he had been heard upon that point it is possible, in the light of his argument and the supporting authorities which he could advance,[10] that the court might have concluded that it should accept the fine and end the imprisonment. The court might have been persuaded on other grounds to amend by eliminating the imprisonment rather than the fine.[11] While the certificates of Judge Maris and of the court clerk indicate that (except, perhaps, with reference to the element of possible hardship in raising the fine) the court below may have been aware of all factual matter pertinent to a determination as to whether it could and should make the amendment,

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[10] The certificates do not reveal that the court gave consideration to these authorities before making its amendatory order, and it would appear from conversation with the Assistant United States Attorney to whom reference has been made that it had not done so.

[11] While petitioner does not allude to any hardship, financial or otherwise, in raising the fine, and the prompt payment of it would seem to indicate otherwise, particularly since petitioner had six months in which to pay it before he could be imprisoned for its nonpayment (cf. 18 U. S. C. 641), we are left in ignorance as to whether he could have shown that the money was obtained under such circumstances as might have been conducive to the elimination of the imprisonment.

it cannot be gainsaid that petitioner at least had a substantial legal argument which might have swayed the decision.

The amendment was not one of the types which ordinarily may be made in the absence of the defendant or his counsel. While the court undoubtedly thought that it was merely decreasing the punishment which it had originally given and therefore there was no occasion to call petitioner or his attorney before it,[12] the court was under some authorities relied upon by petitioner (*supra*, p. 7) directing an invalid increase in punishment.[13]

Nor did the amendment fall within that category wherein a court may, without notice to a defendant or his counsel, eliminate the manifestly invalid portion of a sentence, leaving the valid portion to stand (*Ainsworth* v. *Sanford*, 104 F. (2d) 96 (C. C. A. 5); *Garrison* v. *Reeves*, 116 F. (2d) 978, 979 (C. C. A. 8).[14] The original sentence of the court below was not, according to the *Lange* decision (pp. 174–175), wholly void. Either of the punishments was one alternatively

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[12] Cf. *United States* v. *Benz*, 282 U. S. 304, 306; *United States* v. *Healy*, 202 Fed. 349 (D. Mont.).

[13] Compare *Hatem* v. *United States*, 42 F. (2d) 40, 41 (C. C. A. 4); *De Maggio* v. *Coxe*, 70 F. (2d) 840 (C. C. A. 2); *Rowley* v. *Welch*, 114 F. (2d) 499, 500 (App. D. C.).

[14] See also *Fleisher* v. *United States*, 302 U. S. 218, 220; *Blitz* v. *United States*, 153 U. S. 308, 318; *Hewitt* v. *United States*, 110 F. (2d) 1, 11 (C. C. A. 8), certiorari denied, 310 U. S. 641; *D'Allessandro* v. *United States*, 90 F. (2d) 640 (C. C. A. 3); *United States* v. *Mazzochi*, 75 F. (2d) 497, 498

permitted by the statute. The court undoubtedly, of its own motion, could have vacated either punishment before it was satisfied (*Lange*, p. 174), but when either was satisfied the court was without power to compel execution of the other; that would constitute double punishment for the same offense. Here the crucial question was whether, notwithstanding the payment of the fine, the court could cause its satisfaction by restoring the fine to petitioner; if not, the requirement of imprisonment would be a second punishment for petitioner's offense. The state of the law on the question made it one that was highly arguable. The situation was not one where a patently excessive portion of a sentence was being eliminated.

The amendment, also, did not fit within that group in which a court may *nunc pro tunc*, in the absence of a defendant or his counsel, correct its judgments or records to make them reflect what actually occurred, although, of course, even in such a case a defendant should be present where the issue is in doubt and must be explored by testimony. *United States ex. rel. Campbell* v. *Bishop*,

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(C. C. A. 2); *Spirou* v. *United States*, 24 F. (2d) 796, 797 (C. C. A. 2), certiorari denied, 277 U. S. 596; *Priori* v. *United States*, 6 F. (2d) 575, 576 (C. C. A. 6); *Miller* v. *United States*, 4 F. (2d) 228, 232 (C. C. A. 7), certiorari denied, 268 U. S. 692; *Murphy* v. *United States*, 285 Fed. 801, 818 (C. C. A. 7); *Millich* v. *United States*, 282 Fed. 604, 606 (C. C. A. 9); *Salazar* v. *United States*, 236 Fed. 541 (C. C. A. 8); *Jackson* v. *United States*, 102 Fed. 473, 490 (C. C. A. 9).

47 F. (2d) 95, 96–97 (C. C. A. 5); *Peck* v. *United States*, 65 F. (2d) 59, 65 (C. C. A. 7); *Downey* v. *United States*, 91 F. (2d) 223, 230–235 (App. D. C.); *Foster* v. *Zerbst*, 92 F. (2d) 950, 952 (C. C. A. 10). See also *Nagel* v. *The People*, 229 Ill. 598, 606 (1907). Here there was a judicial, not a clerical, error and the correction of it might have been influenced by argument.

The amendment here seems more akin to an initial sentence than the modifications which have been mentioned. It is a general rule that a sentence may not be pronounced against a defendant in a federal criminal case unless he is present, except, of course, where he has waived the right to be present by voluntarily absenting himself, a factor not here present. There is no reason to suppose that a different rule applies in a federal criminal contempt case. *Diaz* v. *United States*, 223 U. S. 442, 455–459; *Schwab* v. *Berggren*, 143 U. S. 442, 448; *Ball* v. *United States*, 140 U. S. 118, 131; *Anderson* v. *Denver*, 265 Fed. 3, 5 (C. C. A. 8); see also *Ex parte Terry*, 128 U. S. 289, 310–314; *Blackmer* v. *United States*, 284 U. S. 421, 440.[15] The *raison d'etre* of the rule is, of course, *inter alia*, that a defendant may have opportunity to advance any reason he may have why, despite the verdict, finding, or confession of

[15] There is language in the *Diaz* case (p. 455) and in *Lewis* v. *United States*, 146 U. S. 370, 372, indicating that the presence rule may be confined to felonies. A federal criminal contempt may probably be analogized to a felony since the

guilt, he should not be sentenced at all;[16] or he may be able to suggest some ameliorating circumstance which may persuade to leniency in the sentence. While some of the lower court decisions, generally by way of dictum, too sweepingly declare, we think, that no change or modification may validly be made in a sentence without the defendant being present, no matter how informal or unimportant may be the amendment, and, indeed, although the amendment may actually benefit the defendant,[17] the amendment here was not *pro forma* or clearly insubstantial in character but an amendment which, if petitioner's contentions and authorities be accepted, resulted in an unauthorized increase in punishment. For this reason, and also because, if the court decided it had a free hand to change the sentence, the change was a matter involving discretion as to the form it would take, we believe that the court should have heard petitioner before it made the amendment.

There would seem to be no doubt as to the

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court, under the statute, may impose a sentence of imprisonment exceeding a year. 18 U. S. C. 541. In the *Ball* case (p. 129) it is stated that "At common law no judgment for a corporal punishment could be pronounced against a man in his absence."

[16] *Ball* v. *United States*, *supra*, at p. 131; *Schwab* v. *Berggren*, *supra*, at pp. 446–447; *Anderson* v. *Denver*, *supra*, at p. 5.

[17] See *United States ex rel. Coleman* v. *Cox*, 47 F. (2d) 988, 990 (C. C. A. 5); *McDowell* v. *Johnston*, 36 F. Supp. 902, 904 (N. D. Cal.); *Fels* v *Snook*, 30 F. (2d) 187 (N. D. Ga.); *Price* v. *Zerbst*, 268 Fed. 72 (N. D. Ga.); *Ex parte Waterman*, 33 Fed. 29 (N. D. N. Y.).

power of the court below, if the case is remanded, to give further consideration to what its ultimate sentence should be after hearing argument. A void portion of a sentence may be eliminated at any time regardless of the expiration of the term at which it was entered.[12] One or the other of the punishments imposed by the original sentence is void. The determination must be which one is to remain. If the imprisonment portion of the sentence is now void because of the payment of the fine, the imprisonment may be terminated. If the imprisonment portion of the sentence may stand, the petitioner may not, of course, validly be subjected also to the fine, and that portion of the sentence can undoubtedly be eliminated regardless of the expiration of the term, the fine not yet having passed into the

[12] *Miller* v. *United States*, 128 F. (2d) 519, 520 (C. C. A. 5), certiorari denied, October 12, 1942 (No. 150, present term); *Gilmore* v. *United States*, 124 F. (2d) 537, 538–539 (C. C. A. 10), certiorari denied, 316 U. S. 661; *Wells* v. *United States*, 124 F. (2d) 334 (C. C. A. 5), certiorari denied, 316 U. S. 661; *Robinson* v. *Johnston*, 118 F. (2d) 998, 1000 (C. C. A. 9), certiorari granted and case remanded for further proceedings, 316 U. S. 649; *Garrison* v. *Reeves*, 116 F. (2d) 978, 979 (C. C. A. 8); *Meyers* v. *United States*, 116 F. (2d) 601, 603 (C. C. A. 5); *DeBenque* v. *United States*, 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681; *Copeland* v. *Archer*, 50 F. (2d) 836, 839 (C. C. A. 9); *Biddle* v. *Thiele*, 11 F. (2d) 235, 237 (C. C. A. 8); *Hammers* v. *United States*, 279 Fed. 265, 266–267 (C. C. A. 5); *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8); see also *Holiday* v. *Johnston*, 313 U. S. 342, 349; *Miller* v. *Aderhold*, 288 U. S. 206, 210–211; *In re Bonner*, 151 U. S. 242, 259–260.

Treasury of the United States. If there is a choice there is discretion. These are problems for the resolution of the court below in the performance of a function peculiarly its own, the choice of pains and penalties. Where the exercise of that function is complicated, as it is here, by the presence of a highly contestable question, this Court should not be required to review a judgment which has been passed without having the benefit of the decision of the court below after the hearing of argument.

CONCLUSION

For the reason stated, it is respectfully submitted that the amended judgment of the circuit court of appeals should be vacated and the cause remanded to that court with instructions that the defense be afforded an opportunity to be heard before final action is taken on the sentence and that pending such action the petitioner should be allowed to be at large, as he is now, on appropriate bail.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
JOHN FORD BAECHER,
W. MARVIN SMITH,
Attorneys.

JANUARY 1943.

APPENDIX

In the United States Circuit Court of Appeals for the Third Circuit

No. 8140

In re William V. Bradley

(Original—Criminal contempt)

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, certify that on October 1, 1942, prior to eleven o'clock in the morning, Timothy J. McElroy, one of the attorneys for William V. Bradley, came into my office and paid to me in cash the sum of five hundred dollars ($500.00) to satisfy that part of the judgment of the said court which imposed a fine in that amount upon the said William V. Bradley. I at first intended to deposit this in the Registry of the court, but the receipt of a fine being a novelty in my court, I decided to consult Judge Maris, who had presided at the contempt hearing, as to its disposition and did so forthwith. Judge Maris suggested that I get in touch with the Clerk of the United States District Court at Philadelphia, who would be more familiar with the handling of a fine. I subsequently, on the same day, did confer with the Clerk of the District Court, but before I had time to make deposit of the money and after banking

hours had closed, I received from the court an order amending the judgment or sentence theretofore entered, by directing the elimination of the fine of five hundred dollars, but reimposing the sentence of six months imprisonment, and was informed by the court that I was to return the fine to Mr. McElroy. I was unable to contact Mr. McElroy that day, but did so on the following day, October 2, 1942, and he refused to accept the return of the money, which has since remained in my personal custody.

I further certify that the United States Circuit Court of Appeals for the Third Circuit has but one term per year, which commences on the first Monday of October and continues until the first Monday of October in the following year. This whole transaction therefore took place during the October Term, 1941, as there had been no adjournment of that term.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 28th day of December, 1942.

[SEAL] /s/ WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8140

IN RE WILLIAM V. BRADLEY

I, Albert B. Maris, Judge of the Circuit Court of Appeals for the Third Circuit, hereby certify

that on October 1, 1942, in the forenoon, Mr. William P. Rowland, Clerk of the Circuit Court of Appeals for the Third Circuit, consulted with me relative to the disposition of the fine of Five Hundred Dollars ($500) paid to him in cash on behalf of the petitioner herein.

I further certify that subsequently, on the same day, Mr. Thomas J. Curtin, Assistant United States Attorney, called my attention to the fact that the imposition of a fine and imprisonment for a summary contempt was questionable.

I further certify that later, during the afternoon of the same day (October 1, 1942) an amendatory order was sent to the Clerk of the Circuit Court of Appeals eliminating the fine from the sentence, and, at the same time, I instructed Mr. Rowland to return the fine to the petitioner's attorney.

In testimony whereof, I hereunto subscribe my name, at Philadelphia, this 28th day of December A. D. 1942.

/s/ ALBERT B. MARIS, *J.*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING

Washington, D. C., December 3, 1942.

Honorable CHARLES FAHY,
Solicitor General,
Department of Justice, Washington, D. C.

DEAR MR. FAHY: In response to your letter of November 25, 1942, requesting information regarding the practice ordinarily followed by the

clerk of a United States court after a fine imposed is paid, I am glad to give you the following outline:

A fine collected by the clerk of a court is deposited with all collections, other than registry funds, in a local depositary for transmittal to the Treasurer of the United States for credit to the clerk's trust fund receipt account, in accordance with 31 U. S. C., 725 (r) and 28 U. S. C., 544.

The earned portions of the funds in that account, and fines properly collected, are transferred to the appropriate general fund receipt accounts in the Treasury after certification by this office to the Treasury Department of the clerk's trust fund transfer voucher at the end of the quarterly accounting period (March 31st; June 30th, September 30th and December 31st). From time to time the Treasury Department appropriates from the trust fund receipt account sufficient funds for advancement to the clerk's checking account upon requisition of this office at the request of the clerk, in accordance with 31 U. S. C., 725 (r), upon which checking account he may draw for his usual financial transactions, including the return of moneys erroneously or excessively collected.

If error in the collection of a fine is discovered after the clerk has made to this office his quarterly accounting in which he has requested the transfer of the fine from his trust fund receipt account to the appropriate general fund receipt account, the error may still be corrected by the return of the transfer voucher by this office to the clerk for removal of the item at any time prior to certifica-

tion of the transfer voucher to the Treasury Department.

A fine is beyond recall by the clerk only after it has been transferred into the general fund receipt account following certification by this office. Thereafter a refund would be obtainable only upon presentation of a claim to the General Accounting Office. On approval of such claim by that office the refund would be payable out of an annual Congressional appropriation, refunding moneys erroneously received and covered into the Treasury.

Sincerely yours,

/s/ HENRY P. CHANDLER, *Director.*

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SUPREME COURT OF THE UNITED STATES.

No. 473.—October Term, 1942.

In re William V. Bradley, Petitioner. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 1, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

A proceeding, instituted by the National Labor Relations Board against Delaware-New Jersey Ferry Company for enforcement of an order of the Board, was pending in the Circuit Court of Appeals. A hearing was set at which witnesses were to be heard. The petitioner was to be a witness for the Board. During the course of the trial the petitioner was summoned and, after hearing, was adjudged guilty of contempt because of his intimidation of a witness for the Ferry Company in the corridor adjoining the court room.

The court sentenced the petitioner to six months' imprisonment, to pay a fine of $500, and to stand committed until he complied with the sentence. The sentence was erroneous; *Ex parte Lange*, 18 Wall. 163, 176. Under § 268 of the Judicial Code, 28 U. S. C. 385, the sentence could only be a fine *or* imprisonment. *Ex parte Robinson*, 19 Wall. 505, 512; *Clark* v. *United States*, 61 F. 2d 695, 709; affirmed 289 U. S. 1.

The marshal was directed forthwith to execute the judgment. On September 28, 1942, the petitioner was taken into custody and committed to prison. On October 1 his attorney paid the fine in cash to the clerk of the court. Later on that day the court, realizing that the sentence was erroneous, delivered to the clerk an order amending it by omitting any fine and retaining only the six months' imprisonment. The court instructed the clerk, who still held the money, to return it to the petitioner's attorney. The latter refused to receive it, and the clerk has it.

The petitioner, being in jail, petitioned this court to grant certiorari, alleging as errors the adjudication that he was guilty

of contempt and the manner of sentencing him. We granted the writ and admitted him to bail pending decision.

We do not review the finding that the petitioner's conduct was a contempt summarily punishable by the court, for we are of opinion that the errors involved in the sentence require that he shall be freed from further imprisonment.

When, on October 1, the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end.[1] It is unimportant that the fine had not been covered into the treasury; it had been paid to the clerk, the officer of the United States authorized to receive it,[2] and petitioner's rights did not depend upon what that officer subsequently did with the money.[3]

It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint.

The judgment is reversed and the cause remanded with directions that the petitioner be discharged from custody.

So ordered.

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[1] Ex parte Lange, *supra*, 176.

[2] In re Fletcher, 107 F. 2d 666, 668.

[3] Ex parte Lange, *supra*, p. 176; and compare the dissenting opinion, pp. 180, 190, 199-200; Yavorsky v. United States, 1 Fed. 2d 169, 171; Moss v. United States, 23 App. D. C. 475, 485.

Mr. Chief Justice STONE, dissenting.

In *Ex parte Lange*, 18 Wall. 163, the trial court did not remit or offer to remit the fine which the offender had paid. The opinion was careful to point out (p. 175) that the fine paid had been covered into the treasury and that the courts were powerless to direct its return. That decision thus lends no support to that now rendered that the choice rests with the offender rather than with the court whether he shall be punished by fine or by imprisonment, either of which alone the court could have lawfully imposed; and that by payment of the fine, imposed and accepted under mistake of law and immediately remitted, he may irrevocably escape punishment by imprisonment.

So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reexamined and rejected. The substance of the punishment imposed on the offender by a fine is in depriving him of the money he has paid. Here he has not been deprived of the money paid to the clerk of the court, for the fine was remitted on the same day on which it was paid, and he was then free to reclaim it. Since he is shown to have suffered no more from the imposition of the fine than if the clerk had refused to receive it when tendered, there is I think no substance in the contention that he will suffer double punishment if compelled to serve out his prison sentence.

The Constitution is concerned with matters of substance not of form. Nothing in its words or history forbids a common sense application of its provisions, or excludes them from the operation of the principle *de minimis*. I can hardly suppose that we would hold unconstitutional an Act of Congress commanding prompt return of a fine mistakenly imposed under these circumstances, and requiring the prison sentence originally imposed to be served. Yet *Ex parte Lange* as interpreted and applied here rests on constitutional grounds which are equally applicable to an Act of Congress.

I agree with the suggestion of the Government that the court's second order resentencing petitioner could not rightly be entered without affording petitioner or his counsel an opportunity to be present, and that the cause should, on that account, be remanded for further proceedings.